STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE W. NEWMEYER, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED April 22, 2014
v	No. 313847 Kalamazoo Circuit Court
DARCY ANN FRANTZ-HAGER, Defendant/Counterplaintiff-Appellant.	LC No. 2012-000131-NZ

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff filed a complaint to collect payment for legal services rendered to defendant in her postjudgment divorce action. Defendant appeals from the trial court order that granted plaintiff summary disposition under MCR 2.116(C)(10) and dismissed defendant's counterclaim without prejudice. For the reasons set forth below, we affirm.

Plaintiff, a Michigan attorney, began representing defendant in her postjudgment divorce proceedings in 2007 regarding issues of child support, spousal support, and enforcement of her judgment of divorce. Plaintiff informed defendant by September 4, 2008 that he would not continue to represent her without payment. Plaintiff agreed to continue the representation on December 9, 2009 after defendant paid $2,000 and agreed that plaintiff's services would be billed at $110 per hour. Plaintiff submitted a bill to defendant around April 11, 2011. Defendant agreed to pay plaintiff $300 per month starting June 2011, with a balloon payment the following year, in consideration of which plaintiff did not file a motion to withdraw his representation. However, plaintiff subsequently filed a motion to withdraw in August 2011 after defendant made only one $300 payment. The trial court granted the motion on August 29, 2011. Plaintiff then filed a complaint against defendant in the trial court, seeking recovery of funds owed for legal services rendered. Defendant counterclaimed, alleging various instances of legal malpractice.

Defendant first argues that the trial court erred by granting summary disposition in favor of plaintiff on his claim for legal fees.[1] First, defendant argues that the court erroneously determined that the owed fees constituted an "account stated." We disagree.

"An account stated is an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance." *Thomasma v Carpenter*, 175 Mich 428, 434; 141 NW 559 (1913) (quotation marks and citation omitted); see also *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002). An account stated may be impeached by evidence of fraud or mistake. *White v Campbell*, 25 Mich 462, 468 (1872). However, absent such evidence, the creditor is entitled to recover the agreed balance of the account stated. *Id*. An account stated does not apply in a situation where there is a claim that an express contract exists. *Thomasma*, 175 Mich at 434-435. "[T]he failure of a debtor to object within a reasonable time to monthly statements rendered amounts to an admission of the correctness of the account . . . ." *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940). To demonstrate that fees for services to a former client have become an account stated, the creditor must prove that the client either expressly accepted the bills by paying them or failed to object to them within a reasonable time. *Keywell & Rosenfeld*, 254 Mich App at 331.

Plaintiff submitted his bill for legal services to defendant in April 2011, the parties agreed to a payment plan for those services as well as any future services, and defendant made one $300 payment. She did not challenge the accuracy of the bill before, at, or after plaintiff's motion to withdraw hearing on August 29, 2011. Indeed, she did not challenge the accuracy of the bill until plaintiff filed the instant complaint in October 2011. By failing to object to the accuracy of the bill within a reasonable time, including at the motion to withdraw hearing, it became an account stated, *Leonard Refineries, Inc*, 295 Mich at 437; *Keywell & Rosenfeld*, 254 Mich App at 331, and the trial court did not err by granting summary disposition in favor of plaintiff on his complaint for payment for legal services rendered.

Second, defendant argues that she should not have had to pay legal fees incurred in obtaining a writ of garnishment that was later quashed as unenforceable.[2] The court originally granted defendant a writ of garnishment against the bank account of a construction business owned by her ex-husband. The court later quashed the writ, finding that the builders' trust fund act, MCL 750.151 *et seq*., protected the funds from garnishment. However, once the funds held in trust are paid to the subcontractors, laborers and materialmen, *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 47; 631 NW2d 59 (2001), any remaining funds would not be held in trust and would be subject to garnishment. Simply, the fact that defendant

[1] We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

[2] The trial court erred by ruling that the writ was unenforceable in its entirety. See *Hager v Frantz-Hager*, unpublished opinion per curiam of the Court of Appeals, issued _____, 2014 (Docket No. 313477).

was unsuccessful in the trial court in garnishing certain funds in her ex-husband's business account did not render the order allowing garnishment unenforceable.

Third, defendant argues that because plaintiff did not file an answer to her counterclaim and did not comply with discovery in general, her ability to challenge the accuracy of the bill was compromised. Plaintiff did not violate discovery orders and was not required to file an answer to defendant's counterclaim until after his motion and renewed motion for summary disposition were decided by the trial court. MCR 2.108(C)(1); *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 495-496; 591 NW2d 364 (1998). We recognize that plaintiff's renewed motion for summary disposition was filed eight days late, MCR 2.108(C)(1), but conclude that the trial court did not abuse its discretion by setting aside the June 14, 2012 default entered on the basis of plaintiff's failure to answer the counterclaim within 21 days of the partial denial of his motion for summary disposition. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). Further, even if there was a discovery violation, reversal is not required because defendant has failed to establish that the outcome of the case would have been different had plaintiff filed an answer to her counterclaim. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (stating that preserved, nonconstitutional error does not warrant reversal unless, after reviewing the entire record, it appears more probable than not that the error was outcome determinative).

We also reject defendant's argument that the trial court abused its discretion by dismissing defendant's legal malpractice counterclaim without prejudice. See *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Although the trial court did not articulate its reasons for granting the dismissal without prejudice, it appeared to be concerned about defendant's failure to appear for the motion hearing as directed. Under MCR 2.504(B)(1), "if a party fails to comply with [the Michigan Court Rules] or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." In this case, defendant failed to appear in court as ordered. She received notice of the summary disposition motion hearing and was even told directly by court staff, via telephone on the morning of the scheduled hearing, that her presence was required. The court delayed the hearing for more than one and one-half hours, allowing defendant time to arrive for the hearing. She chose not to attend and the dismissal of her counterclaim was not an abuse of discretion. MCR 2.504(B)(1); *Vicencio*, 211 Mich App at 506. Moreover, "'[t]he inclusion of the term 'without prejudice' in a judgment of dismissal ordinarily indicates the absence of a decision on the merits, and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been commenced.'" *Thomas v MESC*, 154 Mich App 736, 742; 398 NW2d 514 (1986), quoting 46 Am Jur 2d, Judgments, § 484, pp 646-647. In this case, the trial court's dismissal of defendant's claim appears to be the result of her failure to attend the motion hearing; there was no adjudication on the merits and she was free to refile her claims at another date. *Thomas*, 154 Mich App at 742. Indeed, her claim has since been refiled and so the issue is moot.

Finally, defendant's claim that the trial court violated her rights under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., when it did not allow her to appear by telephone at the November 2, 2012 motion hearing is without merit.[3]

"The ADA was enacted by Congress in part 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Peden*, 470 Mich at 201, quoting 42 USC 12101(b)(1). The provision under which defendant claims a violation, Title 2 of the ADA, 42 USC § 12131 to 12165, generally prohibits discrimination against qualified individuals with a disability by state and local governments. To establish a Title II violation of the ADA, a plaintiff must prove that (1) he or she is a qualified individual with a disability, (2) he or she was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, and (3) such exclusion, denial of benefits or discrimination was due to the plaintiff's disability. 42 USC 12132; *Weinreich v Los Angeles Co Metro Transp Auth*, 114 F 3d 976 (CA 9, 1997).

At several hearings prior to summary disposition, the trial court granted defendant's ADA request to "appear by telephone or other distance means [sic] due to family illness." However, she made no such request for the November 2, 2012 summary disposition hearing. Defendant claims that she had originally been granted permission to appear by phone, and when the summary disposition hearing was adjourned until several months later, she assumed the permission still applied. Her assertion is contradicted by the fact that she contacted court staff, who informed her that she did not have permission to appear by phone at the hearing and was required to appear in person. The court then delayed the hearing for one and one-half hours to allow her time to appear, to no avail. Because the ADA accommodation to appear by telephone was not mandatory and because defendant did not request to appear by telephone for the November 2, 2012 summary disposition hearing, defendant was not denied a benefit under the ADA. Accordingly, the trial court did not violate the ADA by proceeding without defendant's presence. 42 USC 12132; *Weinreich*, 114 F 3d 976 (CA 9, 1997).

Defendant also claims that the trial court's alleged failure to address discovery and subpoena requests denied her access to the trial court in violation of the ADA. Defendant's ADA accommodation provided that she may need to appear at hearings by telephone, which is unrelated to the trial court addressing discovery and subpoena requests. Because defendant cannot establish that the trial court's alleged failure to address discovery and subpoena requests was due to her disability and potential need to appear by telephone at hearings, there was no Title II ADA violation. 42 USC 12132; *Weinreich*, 114 F 3d 976 (CA 9, 1997).

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro

[3] We review de novo questions of statutory interpretation, such as those involving an interpretation of the ADA. *Peden v Detroit*, 470 Mich 195, 200-201; 680 NW2d 857 (2004).